In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1320

IRVING V. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of three counts of willful evasion of income tax for the years 1967-1969, in violation of 26 U.S.C. 7201. The court sentenced petitioner to concurrent three-year terms of imprisonment on each count, all but 120 days of which were suspended, and placed him on probation for five years on the condition that he pay a $5,000 fine (III-Tr. 463-464).[1] The court of appeals affirmed (Pet. App. A). Petitioner principally contends that the trial court should have suppressed certain statements he made to a special agent of the Intelligence Division of the Internal Revenue Service, because the agent failed to warn him of his constitutional rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436.

[1]"Tr." references are to the reporter's transcript of pretrial and trial proceedings.

1. Petitioner does not challenge the finding of the district court that he was not interviewed by the special agent under custodial circumstances. Nor does he claim that his statements were actually coerced or that he was not given the advice of rights which the Internal Revenue Service requires its special agents to give upon initial contact with the taxpayer. Instead, petitioner contends (Pet. 7) that he had become the focus of a criminal investigation by the Internal Revenue Service and was entitled to the full *Miranda* warnings. However, in *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976, this Court expressly rejected the same argument. There, the Court held that special agents of the Internal Revenue Service, investigating potential criminal income tax violations, were not required to warn a person of his constitutional rights in accordance with *Miranda* v. *Arizona, supra,* prior to interviewing him in a non-custodial setting. Thus, the conflict upon which petitioner relies (Pet. 9-10) has already been resolved against him by this Court.

2. Petitioner further argues (Pet. 11-13) that the trial court erred in denying his motion for the names of the prosecution witnesses who would testify at trial. Petitioner points to no specific instances of prejudice arising from the denial of his motion,[2] but instead argues generally that "fundamental fairness" requires pretrial production of the names of the prosecution's witnesses upon request.

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[2]Petitioner states (Pet. 6) that "[o]ne of the key prosecution rebuttal witnesses, whose name was knowingly not disclosed to the defendant, was the only witness whose testimony was asked to be heard again by the jury, just before reaching their verdict of Guilty." But this fact does not establish that petitioner was prejudiced because he was unaware of this witness's name prior to the witness's testimony. Moreover, it is not likely the prosecution knew who its rebuttal witnesses would be until it had heard petitioner's case.

While petitioner's claim touches upon an issue of considerable importance that we believe may one day require consideration by this Court — the issue of the power of the district courts to order the prosecution to disclose the names of its witnesses in non-capital cases[3] — this is plainly not the proper case for that purpose. At least two courts of appeals have stated that a district court should order disclosure upon a specific showing of need by the defense. See *United States* v. *Cannone*, 528 F. 2d 296 (C.A. 2); *United States* v. *Richter*, 488 F. 2d 170, 173-175 (C.A. 9). Another court has indicated its view that the district court has discretion to order witness disclosure even without a showing of materiality and reasonableness by the defense, if the district court determines that such action would facilitate the conduct of the trial. *United States* v. *Jackson*, 508 F. 2d 1001, 1007 (C.A. 7).

It is the position of the United States that the foregoing decisions are wrong and that the district courts possess no power to order the prosecution to disclose the identity of its witnesses in advance of trial. The error of these decisions is confirmed by the history of present Rule 16, Fed. R. Crim. P., from which Congress specifically deleted a provision proposed by this Court that would have empowered district courts to order disclosure (see H. Conf. Rep. No. 94-414, 94th Cong., 1st Sess., p. 12 (1975)).

In the instant case, however, petitioner has not met the requirements of *Richter* and *Cannone* for a particularized showing justifying his disclosure request (see Pet. App. B), and the district court did not elect for other reasons to exercise such discretion as it might possess, as in

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[3]Compare 18 U.S.C. 3432, which provides that a defendant charged with a capital offense must be given a list of the prosecution's witnesses at least three days prior to trial.

Jackson. It seems plain, therefore, that no court of appeals would reverse petitioner's conviction on this ground. Moreover, since petitioner's trial was held under the former Rule 16, review by this Court would accomplish little in establishing the principles that govern present and future requests for disclosure of the identity of prosecution witnesses.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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